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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SHAWN JUNIOR CHANDLER, Defendant and Appellant.	G054869 (Super. Ct. No. 16CF2952) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed in part, reversed in part, and remanded.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Shawn Junior Chandler appeals from a judgment after the jury convicted him of deliberate and premeditated attempted murder and assault with a deadly weapon and found true weapon and great bodily injury enhancements. Chandler argues the following: the trial court erred by not granting the jury's request to readback of closing argument from Chandler, who represented himself; insufficient evidence supported the jury's finding of deliberation and premeditation; the court erred when it instructed the jury with CALCRIM Nos. 603 and 372; and the abstract of judgment has an error that must be corrected.

After oral argument, the parties filed supplemental briefs on the effect of the following: Senate Bill No. 1393 (S.B. 1393), effective January 1, 2019, which in relevant part amended Penal Code sections 667, subdivision (a), and 1385, subdivision (b); and Assembly Bill No. 1810, effective June 27, 2018, which in relevant part enacted Penal Code section 1001.36.

As we explain below, we must correct the abstract of judgment and conditionally reverse and remand the matter for the limited purpose of resentencing Chandler pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by S.B. 1393. None of Chandler's other contentions have merit, and we affirm the judgment in all other respects.

FACTS

I. Substantive Facts

Davion Alford was homeless and lived in the Santa Ana riverbed. Alford's bicycle had a flat tire, and he borrowed a bicycle from "Chris." As Chris directed, Alford returned the bicycle to Chandler, who was also homeless and went by the name "Rerun."

The next morning, Chris asked Alford for his bicycle, and Alford said he gave it to Chandler. Alford went to Chandler's tent to inquire about the bicycle. After Chandler denied receipt of the bicycle and said he did not know what Alford was talking about, they argued for about 30 minutes and Alford left.

At some point, Alford went back to Chandler's tent. Chandler was upset because he had a woman in his tent and Alford was bothering him about the bicycle. Chandler said, "'I already dealt with you, get outta my face.'" They argued about the bicycle for another 30 minutes. Chandler had a stick and swung it at Alford. Alford backed away and said, "'All right. Like I'm over it. You're going to get yours.'"

Alford left and went to the riverbed where he saw Jose Chavarin and told him what happened with the bicycle. About five to seven minutes later, Chandler approached Alford, who was sitting on a ledge, and stabbed him with a folding knife in the abdomen near his ribs.

Chandler walked toward his tent, and Alford walked toward the bicycle trail where he encountered a man he referred to as "Ebony," who called 911. Ebony told the police dispatcher that Alford said "Shawn" stabbed him and Alford described "Shawn" as a "[s]hort, [b]lack and fat" man wearing a blue shirt and shorts.

Officer Ethan Maietta responded to the scene and spoke with Alford. Alford told Maietta that "Shawn" stabbed him, and he described him as a heavyset black male, about 5 feet 6 inches tall, who wore a blue shirt and black shorts. An ambulance took Alford to the hospital where he received four staples to close the stab wound. Maietta and his partner searched the area for about 45 minutes but could not find Chandler.

At the hospital, Alford identified Chandler as his attacker in a photographic lineup. Officer Amanda Brown interviewed Alford at the hospital. Alford told Brown that "Rerun" stabbed him and where Chandler lived. Alford told Brown that it was 15 seconds from the time he left the tent to the time he was stabbed. Brown called Maietta and told him that Chandler lived in the first blue tent underneath the Interstate 5 freeway. About 90 minutes after his first, unsuccessful, visit to the tent, Maietta found Chandler in the tent—he matched Alford's description. In the tent, Maietta found a knife that flipped open and could have caused Alford's wound.

II. Procedural Facts

An information amended by interlineation charged Chandler with the following: willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a), all further statutory references are to the Penal Code, unless otherwise indicated) (count 1); and assault with a deadly weapon (§ 245, subd. (a)(1)) (count 2). The information alleged Chandler inflicted great bodily injury (GBI) (§ 12022.7, subd. (a)), as to counts 1 and 2, and personally used a deadly weapon as to count 1 (§ 12022, subd. (b)(1)). The information also alleged parole/probation allegations. (§§ 1203.085, subds. (a) & (b), 1203, subd. (e)(3).) Finally, the information alleged Chandler suffered a serious and violent felony (§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1), a serious felony (§ 667, subd. (a)(1)), and two prior prison terms (§ 667.5, subd. (b)).

After the preliminary hearing, Chandler filed a motion to remove his counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, 124. The trial court denied the motion. A couple weeks later, Chandler requested to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), and completed a *Faretta* waiver form. After ensuring Chandler understood the implications of his request, the trial court granted the motion.

At trial, Alford, who was in custody because he failed to appear, testified concerning the events described above. Alford, and Chavarin, who was also in custody because he failed to appear to testify, provided testimony that called into doubt whether it was Chandler who stabbed Alford. Alford testified a man named "Potia" stabbed him. Chavarin testified a man named "Pepita" stabbed Alford. This testimony was inconsistent with their previous statements or testimony. Chandler cross-examined all the prosecution's witnesses, including Alford and Chavarin who both denied Chandler stabbed Alford.

Before the trial court instructed the jury, both the prosecutor and Chandler delivered closing argument. As relevant here, the court instructed the jury with the following CALCRIM instructions: No. 220 "Reasonable Doubt"; No. 222 "Evidence"; No. 252 "Union of Act and Intent: General and Specific Intent Together"; No. 315 "Eyewitness Identification"; No. 372 "Defendant's Flight"; No. 600 "Attempted Murder"; No. 601 "Attempted Murder: Deliberation and Premeditation"; No. 603 "Attempted Voluntary Manslaughter: Heat of Passion—Lesser Crime"; and No. 3517 "Deliberations and Completion of Verdict Forms".

During jury deliberations, the jury requested a transcript of Chandler's closing argument; the jury also requested a tape player. In discussing the jury's request with the prosecutor and Chandler, the trial court stated the following: "The [jury] is asking for a transcript of [Chandler's] closing argument. The court does not *ordinarily* provide any sort of a readback of either party's argument. So the court proposes responding as follows: The court *cannot* provide a transcript of the parties' arguments. If you request it, the court reporter can read back the testimony of witnesses. Which is what the court has permitted in the past. [¶] Any objection to handling it that way from the [prosecution's] point of view?" (Italics added.) After the prosecutor replied, "No," the court asked Chandler if he objected to handling it in this manner. Chandler responded, "No, sir." The court answered the jury's question as follows: "The court *cannot* provide transcripts of the parties' arguments. If you request it, the court reporter can read back the testimony of witnesses." (Italics added.)

The jury convicted Chandler of counts 1 and 2 and found true the allegations. At a bifurcated bench trial, the trial court found true the prior conviction and prison allegations.

At the sentencing hearing, the trial court noted Chandler was statutorily ineligible for probation, but if he were eligible, the court would not grant probation because it was a violent crime and "[t]he case [was] just too serious." The court noted

Chandler had a "serious" criminal history; the probation reported indicated he suffered convictions for drug offenses, forgery, assault, robbery, and domestic violence and had numerous major custodial violations. The court explained that although the tentative sentence was prescribed by law, "if the court were at liberty to impose the sentence, [it] would be imposing something very similar . . . because . . . Chandler does have a long history of violence and it's getting worse." After referring to Chandler's criminal history, including domestic violence and robbery, the court opined his conduct "very serious in terms of the risk that it poses to the public[.]"

The court sentenced Chandler to an indeterminate prison term of seven years to life, doubled to 14 years to life on count 1. The court sentenced him to a determinate prison term of one year on count 1's personal use of a deadly weapon enhancement and five years on the serious felony conviction enhancement for a total of six years. Chandler was to serve the six years followed by the 14 years to life. The court imposed and stayed the sentence on count 2 and struck the sentence on the GBI and prison prior enhancements. The court awarded Chandler 163 days of actual credit and 24 days of conduct credit for a total of 187 days of credit. The abstract of judgment for the indeterminate sentence indicated the court awarded Chandler actual credits of 63 days, not 163 days, and 24 days of conduct credit for a total of 187 days of credit.

DISCUSSION

I. Readback of Chandler's Closing Argument

Chandler argues the trial court erred by denying the jury's request to readback his closing argument. We disagree.

Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the

presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

In *People v. Gordon* (1990) 50 Cal.3d 1223, 1257-1258, 1260 (*Gordon*),[1] the jury requested a readback of defense counsel's closing argument, and the trial court denied the request, concluding it lacked authority to make such an order. The *Gordon* court affirmed, rejecting defendant's claim section 1138 required a readback of closing argument. (*Id*. at pp. 1259-1260.) The court stated section 1138's plain language required a readback of "only evidence and law[]" and not argument. (*Id*. at p. 1260.) The court also rejected defendant's claim his Sixth and Fourteenth Amendment rights were violated. (*Ibid*.) However, the court added that a trial court has the inherent authority to order a readback of closing argument or a transcript be provided to the jury. (*Ibid*.) The *Gordon* court concluded the trial court did not abuse its discretion by denying defendant's request because the court did not want to divert the jury's attention from the evidence and the instructions. (*Ibid*.)

Two years later, the California Supreme Court faced the identical issue in a capital case. In *People v. Pride* (1992) 3 Cal.4th 195, 266 (*Pride*), the court reaffirmed *Gordon*, stating section 1138 "gives a deliberating jury the right to rehear evidence and instruction on request, but does not extend to argument of counsel. [Citation.]" (*Pride, supra,* 3 Cal.4th at p. 266.) After rejecting defendant's claims section 190.3, the death penalty statute, required readback of argument, the court also rejected defendant's claim the court abused its discretion by rejecting his request because the court was concerned with distracting the jury's attention from the evidence and instructions. (*Pride, supra,* 3 Cal.4th at p. 266.)

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[1] Overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835.

The following year, the California Supreme Court again addressed this issue in *People v. Sims* (1993) 5 Cal.4th 405, 452 (*Sims*). After discussing *Gordon*, the *Sims* court concluded the trial court erred when it indicated it did not have the authority to order a readback of defense counsel's closing argument. (*Sims, supra,* 5 Cal.4th at p. 453.) Citing to *People v. Watson* (1956) 46 Cal.2d 818, 836, the court concluded however defendant was not prejudiced by the error because the defense's theory was not complex and the jury instructions fully covered the disputed issue. (*Sims, supra,* 5 Cal.4th at p. 453.)

The California Supreme Court faced the identical issue 10 years later in *People v. Gurule* (2002) 28 Cal.4th 557, 648 (*Gurule*). Citing to *Pride*, the *Gurule* court reaffirmed section 1138 authorizes readback of evidence and law but not argument. (*Gurule, supra,* 28 Cal.4th at p. 649.) Additionally, the court explained the trial court did not abuse its discretion because defense counsel "arguably misstated the law" during the portion the jury wanted to rehear. (*Ibid*.) Finally, the *Gurule* court rejected defendant's claims his Sixth Amendment rights were violated "[b]ecause defense counsel was able to make a full closing argument before the jury[.]" (*Ibid*.)

Anticipating the Attorney General's forfeiture argument, Chandler argues his lack of objection did not forfeit this issue because the law is "somewhat unclear." The law on this issue is clear and has been since 1990. As Chandler acknowledges, section 1138 did not authorize his request but the court did have the inherent authority to grant his request. The California Supreme Court first announced these principles in 1990, and reaffirmed them in 1992 in *Pride*, in 1993 in *Sims*, and in 2002 in *Gurule*. That a court may have found error in one case but not another does not make the law unclear, that's simply the application of the law to a particular set of facts. The law is settled, and Chandler's failure to object forfeits appellate review of the issue. (*Faretta, supra,* 422 U.S. at p. 834, fn. 46 [self-represented defendant must comply with relevant procedural rules and substantive law]; *People v. Roldan* (2005) 35 Cal.4th 646, 729 [if

party fails to object to court's response to question posed by jury during deliberations any claim on appeal based on court's response generally forfeited], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Additionally, Chandler's assertion an objection would have been futile because the court "ordinarily" denies these requests is meritless. (*People v. Woodruff* (2018) 5 Cal.5th 697, 769 [lack of objection forfeits claim unless objection futile].) The court asked Chandler if he objected to the court's response to the jury, and he said, "No." Instead, Chandler could have explained why in this case a readback of his closing argument was appropriate.

In any event, the trial court did not err by denying the jury's request to readback Chandler's closing argument. Chandler acknowledges section 1138 did not require the trial court to readback Chandler's closing argument or provide a transcript of that argument to the jury, but he claims the court believed it lacked the inherent authority to do either or both. Chandler focuses on the trial court's statement it "cannot" provide a transcript of Chandler's argument to the jury. He takes this out of context.

The court first stated he "ordinarily" did not provide a readback of closing argument to the jury. The court's use of "ordinarily" establishes he understood he had the authority to provide readback of closing argument but in most cases where it was requested he declined. Thus, this case is not like *Sims, supra,* 5 Cal.4th at page 453, where the trial court told counsel it lacked the authority to order a readback of closing argument. The court then stated he could not provide a transcript of Chandler's argument. Based on a complete reading of the court's comments, we conclude the court understood it had the authority to grant Chandler's request but that a certified transcript of Chandler's closing argument was unavailable. Finally, the court offered the jury a readback of any testimony it wished to hear. The court did not abuse its discretion by denying the jury's request because we conclude it was concerned a readback of Chandler's closing argument would divert the jury's attention from the evidence.

Chandler contends the trial court denied his Sixth and Fourteenth Amendments right to self-representation, right to a jury trial, and right to present a defense. Unfortunately, the Attorney General does not address these claims.

The Sixth Amendment guarantees an accused can personally present his own defense. (*Faretta, supra,* 422 U.S. at p. 821; *People v. Bloom* (1989) 48 Cal.3d 1194, 1240 [purpose of right to represent oneself safeguard trial as an adversary process].) "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.) Finally, "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

Here, the trial court granted Chandler's request to represent himself and thus to personally present his own defense. In exercising this right, Chandler had ample opportunity to ensure the adversarial process operated correctly, cross-examining Alford and Chavarin and getting them both to testify he did not stab Alford. Chandler did not present any witnesses, but instead rested on the state of the evidence and highlighted weaknesses in the prosecution's case.

Additionally, Chandler delivered his closing argument to the jury. Chandler stated neither Alford nor Chavarin identified him as the attacker. He said there was no physical evidence connecting him to the crime, including no DNA on the knife found in his tent. He argued there was no intent to kill because Alford was not stabbed near any vital organs and the victim suffered only a scratch. He argued alternative theories. Chandler claimed he did not commit the crime. But he also stated the following: "I'm heated, maybe even the heat of passion might come into play, I dare not say, but it's possible[;]" and "I'm defending." "Because defense counsel was able to make a full closing argument before the jury, defendant's ability to have counsel

participate fully and fairly in the factfinding process was not significantly diminished." (*Gurule, supra,* 28 Cal.4th at p. 648.)

Contrary to Chandler's claim otherwise, the issues, identification and intent, were not "nuanced" or "subtle[]." Alford and Chavarin initially stated Chandler was the attacker and then when Chandler confronted them during cross-examination, they recanted. This was a straightforward credibility call. Although Chandler argued different, inconsistent theories, his closing argument was not particularly complex. Moreover, the trial court instructed the jury on all the relevant legal principles, including the elements of the charged crime and its lesser included offenses, intent, and eyewitness identification. Chandler has not demonstrated the court denied him the right to present a defense.

Finally, Chandler asserts the trial court should have inquired further before denying the jury's request because it "came so soon after the start of deliberations strongly suggests that there was some problem with hearing, digesting[,] or understanding the defense argument." Based on our review of the record, and the court's comments, we conclude it was reasonable for the court not to inquire further because it wanted the jury to focus on the evidence and the instructions. (*Gordon, supra,* 50 Cal.3d at p. 1260.) Finally, because we conclude the trial court did not err, we need not address Chandler's claim he was prejudiced by the error.

II. Sufficiency of the Evidence—Premeditation & Deliberation

Chandler argues there was insufficient evidence of premeditation and deliberation. Not so.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.) """"[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of

action.’’’’ (*People v. Smith* (2018) 4 Cal.5th 1134, 1164.) In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*), the California Supreme Court “identified three categories of evidence relevant to determining premeditation and deliberation: (1) events before the murder that indicate planning; (2) a motive to kill; and (3) a manner of killing that reflects a preconceived design to kill.” (*People v. Gonzalez* (2012) 54 Cal.4th 643, 663.) The *Anderson* guidelines are not all required or exclusive; they are descriptive. (*Ibid.*)

A. Planning

Planning activity means “facts about how and what defendant did *prior* to the [attempted] killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing.” (*Anderson*, *supra*, 70 Cal.2d at p. 27.) Here, the record includes the following sufficient evidence of planning activity. At Chandler’s tent, Alford argued with Chandler about the bicycle. After Chandler swung a stick at him, Alford said Chandler would “get” his and walked to the riverbed where he spoke with Chavarin. Although on the day of the incident Alford told Brown it was 15 seconds from the time he left the tent to the time Chandler stabbed him, at trial he testified it was about five minutes before he was stabbed. Regardless, premeditation and deliberation do not require an extended period of time. (*People v. Salazar* (2016) 63 Cal.4th 214, 245 [calculated and cold judgment may be arrived at quickly].) Based on this evidence, it was reasonable for the jury to conclude Chandler engaged in planning activity when he retrieved a knife and followed Alford to the riverbed where he stabbed him. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1082 (*Koontz*) [defendant’s arming himself and following victim evidence of planning activity].) Contrary to Chandler’s claim otherwise, his conduct was not impulsive or spontaneous, but instead demonstrated reflection. (*People v. Smith* (2018) 4 Cal.5th 1134, 1164 [true test of premeditation and deliberation is extent of reflection].)

B. Motive

Motive means "facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim." (*Anderson, supra,* 70 Cal.2d at p. 27.) Here, the record includes the following sufficient evidence Chandler had a motive to kill Alford. Alford confronted Chandler twice because he had not returned the bicycle to the owner. Chandler acted like he did not know what Alford was talking about and he was hostile because he had a woman in his tent. Chandler told Alford, "I already dealt with you, get outta my face" and swung a stick at him. Based on this evidence, the jury could reasonably conclude Chandler had a motive to stab Alford because he did not want to return the bicycle and he wanted to end the discussion about the bicycle.

Chandler relies on *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1267-1268, to argue "anger" or "bad mood" do not amount to motive. The record here reflects more than anger or a bad mood. The evidence established Chandler was determined not to return the bicycle despite Alford's repeated efforts. With Alford incapacitated, or dead, Chandler would not have to answer questions about the bicycle.

C. Manner

Manner means "facts about the nature of the [attempted] killing from which the jury could infer that the *manner* of [attempted] killing was so particular and exacting that the defendant must have intentionally [attempted to kill] according to a 'preconceived design' to take his victim's life in a particular way for a 'reason'." (*Anderson, supra,* 70 Cal.2d at p. 27.) Here, the record includes the following sufficient evidence the manner of Chandler's stabbing of Alford raised the inference Chandler had a preconceived design to end Alford's life. The evidence demonstrated Chandler surprised Alford from around the corner and stabbed him in the abdomen. In *Koontz, supra,* 27 Cal.4th at page 1082, the California Supreme Court held shooting someone at close range in the abdomen, a vital part of the body, was evidence of "a manner of killing

indicative of a deliberate intent to kill." The same can be said of stabbing someone in the abdomen.

Based on the entire record, we conclude there is sufficient evidence of premeditation and deliberation. Therefore, we decline Chandler's invitation to reduce his conviction for deliberate and premeditated attempted murder to attempted murder.

III. Jury Instructions

Chandler contends CALCRIM Nos. 603 and 372 were legally incorrect. The Attorney General, in addition to its substantive arguments, responds Chandler forfeited appellate review of these contentions because he did not object below. Because the trial court has a duty to correctly instruct the jury and the claims potentially affect his substantial rights, we will address his contentions. (*People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7; § 1259.)

A. CALCRIM No. 603

Chandler asserts CALCRIM No. 603 impermissibly interfered with the jury's deliberative process by shifting the burden of proof to him to prove he acted in the heat of passion or because of a sudden quarrel. We disagree.

"'The relevant inquiry [when instructional error is claimed] is whether, "in the context of the instructions as a whole and the trial record, there is a reasonable likelihood that the jury was misled to defendant's prejudice." [Citation.] Also, """we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given."""' [Citations.]" (*People v. O'Malley* (2016) 62 Cal.4th 944, 991.)

The first portion of CALCRIM No. 603 provides as follows: "An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion."

Contrary to Chandler's claim, CALCRIM No. 603 did not direct the jury to presume he committed attempted murder. The last portion of the instruction states the following: "The People have the burden of proving beyond a reasonable doubt that the defendant attempted to kill someone and *was not acting as a result of a sudden quarrel or in the heat of passion*. If the People have not met this burden, you must find the defendant not guilty of attempted murder." (Italics added.) Additionally, CALCRIM No. 220 instructed the jury the prosecution had the burden to prove Chandler guilty of attempted murder beyond a reasonable doubt.

Chandler relies on *Mullaney v. Wilbur* (1975) 421 U.S. 684 (*Mullaney*), to argue CALCRIM No. 603 violated his due process rights. *Mullaney* is inapposite. In that case, Maine law required defendant to prove by a preponderance of the evidence he acted in the heat of passion to reduce the homicide to manslaughter. (*Id*. at pp. 684-685, 703.) The United States Supreme Court held this violated defendant's due process rights because the prosecution has the burden to prove beyond a reasonable doubt the absence of heat of passion. (*Id*. at p. 704.) CALCRIM No. 603 comports with *Mullaney* and expressly required the prosecution to prove the absence of a sudden quarrel and heat of passion.

Chandler also relies on *People v. Owens* (1994) 27 Cal.App.4th 1155, to argue CALCRIM No. 603 is "slanted" toward the prosecution in the same manner as the instruction in that case. His reliance on *Owens* is misplaced. In that case, the instruction at issue stated, "The People have introduced evidence tending to prove" conduct upon which a conviction could be based. (*Id*. at p. 1158.) The *Owens* court held the instruction was erroneous because it conveyed the inference the prosecution had established guilt. (*Id*. at p. 1158.) CALCRIM No. 603 does not include the language "tending to prove" and thus conveys no such inference.

Finally, Chandler relies on *People v. Kurtzman* (1988) 46 Cal.3d 322, to argue CALCRIM No. 603 impermissibly set the order of deliberations with attempted

murder as the starting point. *Kurtzman* too is inapposite. In that case, the trial court instructed the deadlocked jury it had to unanimously agree on the second degree murder charge before it could consider voluntary manslaughter. (*Id*. at pp. 324, 328.) The California Supreme Court held this was error because it improperly interfered with the jury's deliberations. (*Id*. at pp. 328, 330, 334.) Here, CALCRIM No. 603 did not instruct the jury to consider the offenses in any particular order. Indeed, CALCRIM No. 3517 instructed the jury it could consider the offenses of attempted murder and attempted voluntary manslaughter in whichever order it chose. Therefore, CALCRIM No. 603 did not impermissibly interfere with the jury's deliberative process by shifting the burden of proof to Chandler to prove he acted in the heat of passion or because of a sudden quarrel. Our conclusion precludes any need for a prejudice analysis.

B. CALCRIM No. 372

Chandler argues CALCRIM No. 372 impermissibly permits the jury to infer guilt from flight relying primarily on the below italicized language, "aware of his guilt." Again, we disagree.

The trial court instructed the jury with CALCRIM No. 372 as follows: "If the defendant fled immediately after the crime was committed, that conduct may show that he was *aware of his guilt*. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." (Italics added.)

As Chandler acknowledges, our Supreme Court squarely rejected a challenge to the predecessor of CALCRIM No. 372, CALJIC No. 2.52. (*People v. Mendoza* (2000) 24 Cal.4th 130, 179-181, superseded by statute on other grounds as stated by *People v. Brooks* (2017) 3 Cal.5th 1, 62-63.) And he also acknowledges the identical argument concerning CALCRIM No. 372 was rejected by in *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1158-1159. *Hernandez Rios* found no significant difference between the phrasing of the two instructions and held that

CALCRIM No. 372 passes "constitutional muster." (*Id.* at pp. 1158-1159.) Chandler disagrees with *Hernandez Rios,* but he offers no compelling reason to depart from its holding. We find the reasoning of *Hernandez Rios* persuasive and thus we adopt it here.

Chandler's reliance on *Turner v. Marshall* (9th. Cir. 1995) 63 F.3d 807, 820, overruled on other grounds in *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 681, a case concerning inconsistent statements as evidence of consciousness of guilt, is of no help to Chandler because CALCRIM No. 372 does not state flight is "evidence of guilt." Again, it merely states the jury may consider evidence of flight to establish he was "aware of his guilt." CALCRIM No. 372 did not contain a constitutionally impermissible mandatory inference or an irrational permissive inference. Again, a prejudice analysis is unnecessary having found no error.

IV. Sentencing Issues

A. Sections 1385 & 667

Chandler contends S.B. 1393's recent amendments of sections 667, subdivision (a), and 1385, subdivision (b), apply retroactively and we must remand the matter for the trial court to exercise its discretion pursuant to these provisions. The Attorney General agrees that if this case is not final before S.B. 1393's effective date, January 1, 2019, which it was not, a conditional reverse and limited remand is appropriate. We accept the Attorney General's concession and remand the matter to the trial court for the limited purpose of addressing the applicability of S.B. 1393.

Under the versions of sections 667, subdivision (a), and 1385, subdivision (b), effective until December 31, 2018, courts were required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (§ 667, subd. (a)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667" (§ 1385, subd. (b)). On September 30, 2018, the Governor signed S.B.

1393 which, effective January 1, 2019,[2] amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss for sentencing purposes a prior serious felony conviction. (Stats. 2018, ch. 1013, §§ 1-2.)

In *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*), the California Supreme Court stated the following: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (See *People v. Superior Court (Lara*) (2018) 4 Cal.5th 299, 308 [*Estrada* rule rests on inference that in absence of contrary indications legislative body ordinarily intends for ameliorative changes to criminal law to extend as broadly as possible]; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-973 [S.B. 1393 retroactive to judgments of conviction which are not yet final on January 1, 2019].)

The Attorney General concedes S.B. 1393 applies retroactively to non-final judgments, and Chandler's judgment was not final before S.B. 1393 went into effect. We conditionally reverse the judgment and remand the matter for the trial court to exercise its discretion pursuant to sections 667, subdivision (a), and 1385, subdivision (b).

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[2] The effective date of non-urgency legislation such as S.B. 1393, passed in 2018 during the regular legislative session, is January 1, 2019. (Cal. Const., art. IV, § 8, subd. (c)(1); Gov. Code, § 9600, subd. (a); *People v. Camba* (1996) 50 Cal.App.4th 857, 865.)

B. Section 1001.36

Chandler asserts section 1001.36 applies retroactively and we must remand the matter. The Attorney General disagrees, asserting section 1001.36 is not retroactive, and if it was, it does not apply to Chandler. Because the record before us establishes as a matter of law Chandler would not qualify for diversion, we decline his invitation to decide whether section 1001.36 applies retroactively.

Section 1001.36 created a new *pretrial* diversion program for defendants with diagnosed and qualifying mental disorders, including but not limited to bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder. (§ 1001.36, subds. (a) & (b)(1).) One of the stated purposes of the legislation was to promote "[i]ncreased diversion of individuals with mental disorders . . . while protecting public safety." (§ 1001.35, subd. (a).)

"'[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until *adjudication* . . . ." (§ 1001.36, subd. (c), italics added.) A trial court may grant pretrial diversion if all the following criteria are satisfied:

1. The trial court is satisfied, based on evidence from a qualified mental health expert, the defendant suffers from a recognized mental disorder.

2. The trial court is satisfied the defendant's disorder played a significant role in the commission of the charged offense.

3. The qualified mental health expert's opinion finds the defendant's symptoms motivating criminal behavior would respond to mental health treatment.

4. The defendant consents to diversion and waives his right to a speedy trial.

5. The defendant agrees to comply with treatment for the disorder as a condition of diversion.

6. The trial court is satisfied the defendant *will not pose an unreasonable risk of danger to public safety*. In evaluating whether the defendant poses an unreasonable risk of danger to public safety, the court may consider counsel's and the mental health expert's opinions, as well as the defendant's violence and criminal history. (§ 1001.36, subd. (b).)

Based on the record before us, we are convinced as a matter of law, the trial court would not grant Chandler pretrial diversion because he would not satisfy all the required criteria. At the sentencing hearing, the trial court made it clear Chandler posed an unreasonable risk of danger to public safety. The court detailed his lengthy criminal history and the increasing seriousness of his conduct, including his use of a weapon in this case, and concluded he posed a "very serious" risk to the public. We are convinced beyond any reasonable doubt the court would not grant pretrial diversion to Chandler because he posed an unreasonable risk to public safety based on his violent conduct and serious criminal history.

Finally, if Chandler believes he is entitled to section 1001.36 relief, he is not without a remedy. "An appeal is 'limited to the four corners of the [underlying] record on appeal . . . ." (*People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1.) However, a habeas corpus petition is not and extends to matters outside the record. (*Ibid*.) Again, based on this record, Chandler would not qualify for pretrial diversion, even were it applicable.

V. Abstract of Judgment

Chandler argues the indeterminate abstract of judgment incorrectly indicates he earned 63 days of actual credit instead of the 163 days the trial court awarded him. The Attorney General concedes the error.

As a general rule, a trial court's oral pronouncements are presumed correct. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) A reviewing court may correct an error in the abstract of judgment on its own motion or upon the request of the parties. (*People v.*

Mitchell (2001) 26 Cal.4th 181, 185-187.) We correct the indeterminate abstract of judgment to reflect the trial court awarded Chandler 163 days of actual credit.

DISPOSITION

The matter is remanded to the trial court with directions to resentence defendant pursuant to S.B. 1393. That is, pursuant to sections 667, subdivision (a), and 1385, subdivision (b), effective January 1, 2019, the court is directed to exercise its discretion whether to strike the five-year consecutive term the court previously imposed based on defendant's prior strike conviction. We express no opinion on how the trial court should exercise its discretion.

The clerk of the superior court is ordered to prepare a new abstract of judgment for Chandler's indeterminate sentence reflecting the trial court awarded him 163 days of actual credit and forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations. In all other respects, the judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

IKOLA, J.

GOETHALS, J.